Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd and another appeal

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NOS S7–23–39–87 AND S6–22–192–1988
LIM BENG CHOON J
12 JUNE 1992

Civil Procedure *— Judgment — Default of defence — Further extension of seven days for defence to be filed — Whether O 3 r 2(5) of the Rules of the High Court 1980 applied — Rules of the High Court 1980 O 3 r 2(5)*

Civil Procedure *— Summary judgment — Proper procedure — Application must be supported by affidavit — Whether non-compliance with proper procedure was fatal to the application — Rules of the High Court 1980 O 14 r 2(1)*

The defendant, Lian Seng Properties Sdn Bhd ('LSP'), in the first civil suit, filed a notice of appeal against the decision of the senior assistant registrar ('the SAR') in dismissing LSP's application made by way of summons-in-chambers in which they prayed for an order that the judgment in default of defence entered against them by the plaintiff, Pembinaan KSY Sdn Bhd ('KSY'), be set aside and also another order that all execution proceedings pursuant to the judgment in default be stayed, pending trial and final disposal of the action. In the second suit, LSP filed a notice of appeal against the decision of the SAR in favour of KSY's application and granting leave to KSY to enter final judgment. In respect to the first appeal, counsel for LSP, inter alia, argued that the judgment in default against LSP was a nullity as KSY had given an extension of seven days from 23 March 1987 to enable LSP to file a statement of defence. In respect to the second appeal, counsel for LSP relied, inter alia, on the ground that KSY, having failed to comply with O 14 r 2(1) of the Rules of the High Court ('the RHC'), are not entitled to ask for an O 14 judgment.

Held, dismissing the first appeal but allowing the second appeal:

(1) The last letter sent by KSY merely allowed another extension of the 21-day period by a further seven-day period to file the defence. It is idle to contend that a further extension of seven days for the performance of an act which should have been performed some 21 days earlier must attract the provisions of O 3 r 2(5) of the RHC for the construction of such a seven-day extension.

(2) It is a necessary condition for proceeding under O 14 of the RHC that the application must be supported by an affidavit which complies with O 14 r 2(1). The affidavit must verify the facts on which the claim or part of the claim to which the application related is based and it must also state the deponent's belief that there was no defence to that claim or part thereof, or no defence except as to the amount of any damages claimed. Here, KSY had

failed to comply with the requirements of verifying the facts and this requirement is a condition precedent to the court to make an order under O 14.

[Bahasa Malaysia summary

Defendan, Lian Seng Properties Sdn Bhd ('LSP'), dalam guaman sivil yang pertama, telah memfailkan satu notis rayuan terhadap keputusan penolong kanan pendaftar ('pendaftar') ketika menolak permohonan LSP. Permohonan LSP itu dibuat melalui saman dalam kamar dan di dalamnya mereka memohon satu perintah bahawa penghakiman ingkar pembelaan yang dimasukkan terhadap mereka oleh plaintif, Pembinaan KSY Sdn Bhd ('KSY'), diketepikan dan juga satu perintah lain bahawa semua prosiding pelaksanaan berikutan dari penghakiman ingkar itu digantung sementara menantikan perbicaraan dan penyelesaian muktamad tindakan itu. Di dalam guaman yang kedua, LSP telah memfailkan satu notis rayuan terhadap keputusan pendaftar yang memihak kepada permohonan KSY dan memberikan kebenaran kepada KSY untuk memasukkan penghakiman muktamad. Berkenaan rayuan yang pertama, peguambela LSP, antara lainnya, berhujah bahawa penghakiman ingkar terhadap LSP adalah tidak sah kerana KSY telah memberikan perlanjutan selama tujuh hari dari 23 Mac 1987 untuk membolehkan LSP memfailkan satu kenyataan pembelaan. Berkenaan rayuan yang kedua pula, peguambela LSP bergantung, antara lainnya, kepada alasan bahawa KSY, setelah gagal mematuhi A 14 k 2(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), tidak berhak memohon penghakiman A 14.

Diputuskan, menolak rayuan pertama tetapi membenarkan rayuan kedua:

(1) Surat terakhir yang dihantar oleh KSY cuma membenarkan satu perlanjutan tempoh 21 hari itu selama tujuh hari untuk pemfailan pembelaan. Adalah tidak berguna untuk mendakwa bahawa satu perlanjutan selama tujuh hari untuk pelaksanaan satu tindakan yang seharusnya telah dilaksanakan 21 hari lebih awal mesti menarik peruntukan A 3 k 2(5) KMT untuk mendirikan perlanjutan tujuh hari itu.

(2) Adalah satu syarat yang perlu untuk membawa tindakan di bawah A 14 KMT bahawa permohonan itu mesti disokong oleh satu afidavit yang mematuhi A 14 k 2(1). Afidavit itu mesti mengesahkan fakta-fakta yang mengasaskan tuntutan atau sebahagian tuntutan itu dan ianya juga mesti menyatakan kepercayaan deponen bahawa tidak ada pembelaan kepada tuntutan atau sebahagian tuntutan itu, atau tidak ada pembelaan kecuali berkenaan jumlah ganti rugi yang dituntut. Di sini, KSY telah gagal mematuhi keperluan mengesahkan fakta-fakta itu dan keperluan ini adalah satu prasyarat untuk mahkamah membuat perintah di bawah A 14.]

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 03–48–92 and the plaintiff has appealed to the Supreme Court vide Civil Appeal No 02–298–92.]

Notes

For a case on judgment in default of defence, see 2 *Mallal's Digest* (4th Ed) para 1234.

For a case on the proper procedure in applying for a summary judgment, see 2 *Mallal's Digest* (4th Ed) para 2270.

Cases referred to

1 *Morgan Guaranty Trust Company of New York v Lian Seng Properties Sdn Bhd* [1989] 3 MLJ 172 (not folld)
2 *'Libanbois' v Fama Shipping* [1992] 1 Lloyd's Rep 197 (folld)
3 *Re North, ex p Hasluck* [1895] 2 QB 264 (folld)
4 *Milch v Frankan & Co* [1902] 2 KB 100 (refd)
5 *The Alliance Bank v Broom* [1934] LJ Ch 286 (refd)
6 *Symon & Co v Palmer's Stores (1903) Ltd* [1912] 1 KB 259 (refd)
7 *Supreme Leasing Sdn Bhd v Dior Enterprises & Ors* [1990] 2 MLJ 36 (refd)

Legislation referred to

Rules of the High Court 1980 O 3 r 2(5), O 14

Cecil Abraham (*Shearn Delamore & Co*) and *PS Gill* (*Gill & Tang*) for the plaintiff.

YM Siew (*Soo Thien Ming & Shahrizat*) for the defendant.

Cur Adv Vult

Lim Beng Choon J: The defendant, Lian Seng Properties Sdn Bhd ('LSP'), in Civil Suit No 22(23)39–87 ('CS 39/87') filed a notice of appeal to the judge-in-chambers (encl 37) against the decision of the senior assistant registrar ('the SAR') given on 13 September 1990 dismissing LSP's application made by way of summons-in-chambers (encl 19) in which they prayed for an order that the judgment in default of defence entered against them on 31 March 1987 by the plaintiff, Pembinaan KSY Sdn Bhd ('KSY'), be set aside and also another order that all execution proceedings pursuant to the said judgment in default be stayed pending the trial and final disposal of the action.

Again, LSP in Civil Suit No 22–192–1988 ('CS 192/88'), where they were cited as the first defendant, filed a notice of appeal to the judge-in-chambers (encl 41) against the decision of the SAR given on 17 November 1988 in favour of KSY's application (encl 11) and granting leave to KSY to enter final judgment pursuant to O 14 of the Rules of High Court 1980 against LSP.

Counsel acting for the respective parties agreed that both the appeals be heard together and I heard both the appeals on 10 April 1992.

Appeal in CS 39/87

In respect of the appeal in CS 39/87, counsel for LSP relied on two grounds to support the appeal, namely:

(1) The judgment in default entered by KSY against LSP on 31 March 1987 is a nullity in that as KSY had given an extension of seven days from 23 March 1987 to enable LSP to file their statement of defence which they did so within the extended time, KSY had no right to enter judgment in default on 31 March 1987. That being the case, the said default judgment should be set aside ex debito justitiae.

(2) There had been an accord and satisfaction in respect of the claims in CS 39/87 when KSY executed an agreement on 22 April 1987 with LSP (which is referred to by the parties and also in this judgment as 'the lump sum agreement') by which the parties had agree to enter into a compromise to settle all disputes pursuant to the terms and conditions of the lump sum agreement. In the result, the right of KSY arising from the said default judgment has merged into the lump sum agreement. That being the case KSY can only exercise their said right subject to the terms and conditions of the lump sum agreement. This same ground was also relied upon by counsel for LSP to set aside the O 14 judgment obtained by KSY on 17 November 1988.

In support of the aforementioned ground (1), counsel for LSP drew my attention to the affidavit affirmed by one Ng Yoke Mui ('Cik Ng') the legal adviser to LSP, affirmed on 22 April 1987 (encl 8). The averments in that affidavit generally speak of the negotiations that were going on at the material time and the reason why the defence was not filed earlier. In particular, counsel pointed out to me para 8 of the affidavit in which it was averred:

> Even after this present suit was filed by the plaintiff the negotiations continued and the plaintiff and/or through their solicitors did on numerous occasions enlarge the time required for the filing of the defendant's defence.

Cik Ng then produced several letters marked as exh NYM1(a) to (e) annexed to the affidavit to show that KSY had consented to extend the time for LSP to file their statement of defence. It is appropriate to examine the relevant part of each of those letters in order to find out whether ground (1) of counsel can be sustained. The first letter (exh NYM 1(a)) produced is a letter written by the previous solicitors of KSY dated 13 February 1987 in which it was stated:

> Kindly be informed that pursuant to your clients' request we hereby grant your goodselves until *28 February 1987* to file and serve the defence to the above suit. (Emphasis added.)

The second letter (exh NYM 1(b)) is another letter written by the previous solicitors of KSY dated 17 February 1987 in which it was stated:

> Further to our letter dated 13 February 1987 this is to confirm that all proceedings shall be stayed in respect of Kuala Lumpur High Court Suit No 23–39–87 until further notice.

The third letter (exh NYM 1(c)) dated 19 February 1987 was written by the previous solicitors of LSP in which it was stated:

> With reference to your letter dated 17 February 1987, we have been instructed by our clients to write and confirm that in the event your clients should wish to proceed with the above legal action against our clients you shall give us at least twenty-one (21) days written notice prior to any further proceedings to be instituted hereto.

The fourth letter (exh NYM 1(d)) dated 2 March 1987 written by the previous solicitors of KSY reads:

> We have been instructed by our client to notify yourselves that they intend to proceed with this action and hereby give you twenty one (21) days notice to file and serve your clients' statement of defence.

The last letter (exh NYM 1(e)) dated 20 March 1987 from KSY's solicitors reads: 'We have now been instructed by our clients to give you *an extension of seven (7) days from 23 March 1987* to enable you to file your clients' statement of defence.' (Emphasis added.)

LSP were warned by the same letter that in the event that they fail to put in the statement of defence within the stipulated period, KSY had no alternative but to enter judgment in default.

Counsel for LSP relied solely on the aforementioned last letter to support his contention that since KSY had allowed LSP seven days to file their statement of defence, the seven-day period should be reckoned in accordance with O 3 r 2(5) of the Rules of the High Court 1980 which provides:

> Where, apart from this paragraph, the period in question, being a period of 7 days or less, would include *the day before* the weekly holiday, the weekly holiday or public holiday, *that day* shall be excluded. (Emphasis added.)

It is common ground that 23 March 1987 was a Monday. Accordingly, there was a Saturday and a Sunday within the seven-day period granted by KSY. Counsel for LSP argued that that being so and pursuant to the reckoning provided in O 3 r 2(5) that Saturday and Sunday must be excluded in the calculation of the seven-day period. It therefore follows, so said the learned counsel, that the seven-day period ends on 2 April 1987. As LSP had filed their statement of defence on 2 April 1987, it is futile to suggest that they were in default of defence. Accordingly, the judgment in default of defence was wrongly entered and should be set aside ex debito justitiae. Counsel cited the case of *Morgan Guaranty Trust Company of New York v Lian Seng Properties Sdn Bhd*[1] where my brethren VC George J at p 174 held that since the seven-day extension granted to KSY to file their defence in CS 39/87 ended on 2 April 1987 pursuant to the reckoning as provided in O 3 r 2(5) and LSP had filed their statement of defence on that date, LSP could not have been and were not in default of defence. The learned judge accordingly held, inter alia, that the default judgment entered by KSY on 31 March 1987 was irregular and should be set aside ex debito justitiae. It will be seen here that if the Saturday and the Sunday are included in reckoning the period from 23 March 1987 until 31 March 1987, there were eight days and KSY would be entitled to enter default

judgment on 31 March 1987. However, if the Saturday and the Sunday were both excluded, then KSY would be wrong to enter default judgment on 31 March 1987 since by then only six days had elapsed. In considering the contention of counsel, it is my considered opinion that the letter of 20 March 1987 (exh NYM 1(e)) should not be read in isolation. It must be read, together with the letter dated 2 March 1987 (exh NYM 1(d)) whereby KSY had already notified LSP to file their statement of defence within 21 days with effect from 2 March 1987. The last letter dated 20 March 1987 merely allowed another extension of the 21-day period by a further seven-day period to file the defence. LSP had at least a total of some 28 days to file their defence. In such a situation, the correct answer to the contention raised by counsel for the defendant can only be found after a proper construction of the provisions of O 3 r 2(5). It has been said that the rules of court must be construed in a purposive manner. Thus in *'Libanbois' v Fama Shipping*,[2] Steyn J, at p 199 said:

> Rules of court must be construed not in the fashion of the blackletter man but in a purposive manner. The purpose of rules of court is to provide a fair, efficient, expeditious and economic framework for the resolution of civil disputes consistent with the public interest. The court must reject an interpretation which results in wasteful procedures unless the language of the rules compels such an undesirable result with precision and clarity.

Again in *Re North, ex p Hasluck*,[3] it has been said (at p 269) that 'the rational mode of computation is to have regard in each case to the purpose for which the computation is to be made'. Applying the principles enunciated in the above cases to the construction of O 3 r 2(5), it is important to bear in mind that under the common law and in the absence of some provisions in the relevant Act or rules of court, the period of seven days set down for the performance of an act would include Saturdays and Sundays (see, for example, *Milch v Frankan & Co*[4]). There is no doubt that the rules committee created by s 17(1) and (2) of the Courts of Judicature Act 1964 to formulate the rules of court must have in mind this common law proposition prior to enacting O 3 r 2(5). It is equally fair to assume that the rules committee must have taken into consideration that a seven-day period set aside for the performance of an act is already by itself rather short and restrictive. It would certainly be unfair in reckoning the seven-day period to include Saturdays and Sundays for the mandatory compliance with a rule of court for the doing of an act bearing in mind that a Saturday is a half-working day and a Sunday is a weekly holiday barring certain states which observe Thursday as a half-working day and Friday a weekly holiday. The purpose of enacting O 3 r 2(5) is to provide a statutory declaration that a seven-day period for the doing of an act under the rules of court should not include the day before (that is to say a Thursday or a Saturday as the case may be) the weekly holiday (that is to say a Friday or a Sunday as the case may be) and public holidays in order to avoid the application of the common law rule in construing this short period of seven days. Consequently, the court must construe the provisions of O 3 r 2(5) strictly in accordance with the precise and clear language used in the said order. Construed in this manner, it is to my mind idle to contend that a *further*

extension of seven days for the performance of an act which should have been performed some 21 days earlier must attract the provisions of O 3 r 2(5) for the construction of such a seven-day extension. I therefore hold that O 3 r 2(5) cannot apply in the reckoning of the seven-day extension. For the above reasons, I certainly cannot agree with contention (1) advanced by counsel for the defendant and I hold that KSY was entitled to enter judgment in CS 39/87 on 31 March 1987. In arriving at this conclusion, it would appear that my finding is inconsistent with the finding of VC George J in the *Morgan Guaranty Trust Company of New York* case.[1] With due respect, the learned judge in that case was dealing with an application made by KSY to be substituted as a petitioner in a winding-up petition instituted by Morgan Guaranty Trust Company of New York who at the hearing of the petition indicated by their counsel to the court that the petitioner had no further interest in the petition. The winding-up petition was instituted to wind up LSP. It was in the course of hearing KSY's application that LSP moved the court to have KSY struck off as a supporting creditor. In his submission, counsel for LSP thereupon challenged the validity of the judgment in default obtained by KSY in CS 39/87. The learned judge firstly held that the judgment could be challenged in collateral proceeding and secondly, by reason of the letter of 20 March 1987 (reproduced earlier in this judgment as exh NYM 1(e)) granting LSP until 2 April 1987 to file their defence, KSY was not entitled to enter judgment on 31 March 1987. It is to be noted that it would seem that nobody had drawn the attention of VC George J to the earlier four letters reproduced earlier in this judgment in particular the letter dated 2 March 1987 (exh NYM 1(d)). More importantly, counsel in that case did not advance the arguments as set out above at the hearing before VC George J. Had the full facts been presented to his Lordship and the arguments made before me been likewise submitted to him, it might well be possible that his Lordship would not have made the finding as reported in that case.

With regard to ground (2) raised by counsel for LSP as adumbrated earlier, I shall deal with this ground presently when I proceed to consider the grounds relied on by learned counsel in the appeal of LSP made in CS 192/88.

Appeal in CS 192/88

In respect of the appeal in CS 192/88, counsel for LSP relied on three grounds to support the appeal, viz:

(1) the statement of claim presented by the plaintiffs discloses no cause of action;
(2) as there had been an accord and satisfaction in respect of the claims made in CS 192/88 when KSY executed the lump sum agreement, KSY could only sue LSP pursuant to the terms and conditions as set out in the lump sum agreement; and
(3) the plaintiffs, having failed to comply with O 14 r 2(1) of the Rules of High Court 1980 are not entitled to ask for an O 14 judgment.

Grounds (1) and (2) can be dealt with together as the stand taken by the learned counsel for LSP is that KSY are precluded from suing LSP until

after the expiry of the 18-month period as stipulated in cl 5(c) of the lump sum agreement. For convenience, I shall hereinafter use the abbreviation 'LSA' to mean the lump sum agreement. In considering these two grounds, it is to be noted that:

(a) by cl 3(b) of the LSA, KSY undertook to suspend all legal action until the due date mentioned in cl 5(c) subject however to proviso (1) that if LSP should breach any part of the LSA *or* (2) applications are made by any persons or corporations for the winding up of LSP then KSY would be relieved of their forbearance to sue and KSY would be at liberty to take such legal action as they deem fit;

(b) by cl 4 it is agreed that the project will be deemed completed as a whole upon the appointed architect issuing the certificate of practical completion;

(c) then we have cl 5(a) which provides that upon completion of the project the lump sum of RM26,050,000 'shall be due and payable' together with interest at 9%pa on monthly rests. Payment of the said lump sum and interest shall however be made in the manner provided for in cl 5(b), (c), (d) and (e);

(d) by cl 5(c) LSP undertakes to pay the said lump sum within 18 months from date of completion of the project or upon the occurrence of any sale as provided in para (d) thereof;

(e) by cl 5(d) LSP undertakes upon the sale of any part of KL Plaza other than the sale of apartments KSY will be entitled to the proceeds of the sale after payment of the redemption to the bridging financiers and LSP undertakes to inform KSY of such sale and all details of the sale; and

(f) clause 6 provides for the payment of interest on the said lump sum or balance thereof outstanding at the rate of 9%pa and ½ (half) the monthly interest shall be paid from the date of completion until the date of settlement in full and the remaining ½ to be paid upon receipt of the sale proceeds of any part of the said project as provided in cl 5(d) after settlement of the sums reserved for KSY and the bridging financiers or upon the expiry of eighteen (18) months from the date of completion of the project whichever shall be the earlier.

Pausing here a moment to avert to the relevant undisputed facts, it is to be noted that:

(i) The project architect issued the last certificate of practical completion on 1 November 1987 (see certificate of practical completion no 542 exhibited in PK17 annexed to encl 2).

(ii) LSP were in breach of their obligations to pay interest as agreed in cl 6 of the LSA. Indeed LSP had not even paid a single cent since the date of completion of the project (see exh PK18 to encl 2).

(iii) Vide Kuala Lumpur High Court Petition No D1–42–577–87 Morgan Guaranty Trust Company of New York presented its winding up petition to wind up LSP on 10 August 1987 on the ground of their inability to pay their debts (see para 26 of encl 2).

(iv) The plaintiffs through their solicitors had by letter dated 15 April 1988 gave notice to LSP stating, inter alia, that as a winding up petition had

been presented against LSP, the forbearance to sue provided in the LSA would no longer apply to them (see exh PK19 annexed to encl 2).

(v) It has also been pointed out in encl 2 that LSP had sold part of KL Plaza to a Hong Kong company for RM85m and that they had failed to inform KSY of the sale let alone all details of the sale. Again LSP were in breach of cl 5(d).

In view of the aforesaid undisputed facts, it is clear that upon issue of the last certificate of completion exhibited as PK17 in encl 2 the lump sum of RM26.5m less such sums paid by the bridging financiers becomes due and payable to KSY and the debt crystalized as on 1 November 1987, pursuant to cl 5(a) of the LSA. But KSY are precluded from taking any legal action pursuant to cl 5(a) of the LSA until after the expiry of the 18-month period as stipulated in cl 5(c). In short, the right to sue for the said lump sum has vested in KSY under cll 4 and 5(a) of the LSA upon the issue of the said certificate of completion. However KSY agreed pursuant to cl 5(c) not to sue for the lump sum until after the expiry of 18 months as stipulated in cl 5(c). But this forbearance to sue would no longer apply pursuant to cl 3(b) if:

(i) LSP should be in breach of any of the terms and conditions set out in the LSA; or
(ii) when there is a winding-up petition filed against LSP.

It is clear from the undisputed facts that LSP were in breach of cl 5(d) (disclosure of sale of or part of KL Plaza) and cl 6 (payment of interest) and there was also a winding up petition presented against LSP on 10 December 1987. Hence KSY cannot be said to have no right to sue LSP as from the date of the filing of CS 192 of 1988 when they ceased to be bound by the forbearance to sue clause, namely, cl 3(b) (see *The Alliance Bank v Broom*[5]).

Furthermore, by cl 8 of the LSA, LSP has agreed not to rely as a defence on any of the following: 'any indulgence, waiver or forbearance of any kind given by KSY to either of the other parties thereto', against any action brought by KSY. It is also provided in cl 9 of the LSA that the parties had mutually warranted to each other that they would take all such steps as are necessary to give effect to the due performance of the provisions of the LSA and to refrain from any action that would prejudice the spirit and intent of the said LSA. Here, KSY have performed all and singular their obligations. On the other hand, LSP were not only in breach of the LSA but their cross claim against KSY for defective works made in Civil Suit No 25–105–1988 had also been struck out. Under the circumstances, I have no hesitation in holding that grounds (a) and (b) relied upon by the learned counsel for LSP to set aside the two judgments obtained by KSY are entirely without any merit.

As to ground (3) raised by learned counsel for LSP, it has been said that it is a necessary condition for proceeding under O 14 that the application must be supported by an affidavit which complies with r 2(1) of the said order (see *Symon & Co v Palmer's Stores (1903) Ltd*[6] and *Supreme Leasing Sdn Bhd v Dior Enterprises & Ors*[7]). The affidavit must fulfil the following two requirements:

A (1) it must verify the facts on which the claim or part of the claim to which the application relates is based; and
(2) it must state the deponent's belief that there is no defence to that claim or part, or no defence except as to the amount of any damages claimed.

Any defects or omission in the original affidavit may be cured or supplemented or supplied by an affidavit made subsequently and the court looks at the matter both on jurisdiction and on merits. The verification may be by reference to the facts stated in the statement of claim thus: 'The defendant ... is truly and was at the commencement of this action, justly and truly indebted to (one or the abovenamed plaintiff) in the sum of RM... for the ... (state the nature of the said claim as it appears by the indorsement on the writ of summons in the action)'. The deponent must then go on to affirm that 'it is within my own knowledge that the said debt was incurred and is still due and owing as aforesaid'.

Upon a careful scrutiny of the affidavit in support of KSY's application for summary judgment (encl 19) and an earlier affidavit to support an application for an injunction made by KSY (encl 2), I am satisfied that KSY had failed to comply with the requirement of verifying the facts.But it was argued by the learned counsel for KSY that by reason of the consent order of court dated 9 October 1990 whereby it is stated in para 5:

> that from the proceeds of the sale the first defendant shall lodged in an interest bearing account made in the name of the senior assistant registrar a sum equivalent to the amount owed to the plaintiff on the said judgment of RM10,529,000 dated 31 March 1987 and the judgment of RM12,902,000 dated 17 November 1988 together with interest thereon up to the date of payment;

and para 11: 'that if the aforesaid arrangements are carried out all parties will withdraw all pending proceedings.'

LSP are precluded from raising the issue. With respect I cannot agree for the simple reason that the requirement to verify is a condition precedent to the jurisdiction of the court to make an order under O 14 (see *Symond & Co*'s case[6] cited earlier). One cannot, therefore, ignore this fatal defect on the part of KSY in obtaining the summary judgment. For this reason and this reason alone I have no alternative but to set aside the said judgment.

For the above reasons, the appeal of LSP (encl 37) relating to the default judgment dated 13 September 1990 is dismissed with costs. However their appeal (encl 41) against the O 14 judgment is allowed likewise with costs.

Appeal dismissed.

Reported by K Pasupathy